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VICTOR SAENZ,)	
Petitioner,)	
)	CIVIL ACTION
v.)	
)	No. 02-3119-CM
)	
STATE OF KANSAS, et al.,)	
Respondents.)	
)	

Petitioner was convicted of second-degree murder in the District Court of Wyandotte County, Kansas. On direct appeal, the Kansas Supreme Court affirmed petitioner's conviction. This matter comes before the court on petitioner's Writ of Habeas Corpus (Doc. 1).

Petitioner’s application for habeas relief is governed by the habeas statute as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. *Williams v. Taylor*, 529 U.S. 362, 402 (2000). The Act “places a new constraint on the power of a federal habeas court to grant a state prisoner’s application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court.” *Id.* at 412. Under the amended version of 28 U.S.C. § 2254(d)(1), a petitioner is entitled to federal habeas relief only if he can establish that the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or “was based on an unreasonable determination of the facts in light of the evidence

presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). Under § 2254(d)(1), a federal court may grant a writ of habeas corpus only if the state court reached a conclusion opposite to that reached by the Supreme Court on a question of law, decided the case differently than the Supreme Court has decided a case with a materially indistinguishable set of facts, or unreasonably applied the governing legal principle to the facts of the petitioner’s case. *See Williams*, 529 U.S. at 412-13.

II. Facts

Section 2254(e)(1) requires a habeas court to presume that factual determinations made by the state court are correct unless the petitioner rebuts the presumption with clear and convincing evidence. Petitioner in this case does not dispute the state court’s factual findings, which are as follows: On January 13, 1997, while seated in a car, four individuals provoked and threatened petitioner in a bar parking lot in Kansas City, Kansas. One of the individuals, Marcos Granjada, pointed a gun at petitioner and said, “[Y]ou are going to get it.” The four then drove off at a high rate of speed.

When their car stopped at 7th and Kansas Avenue, a car driven by petitioner pulled up beside them. Petitioner rolled down the window, pointed a gun, and started shooting. Granjada ducked, and one of the other men, Jesus Quezada, was struck by a bullet and eventually died at the hospital as a result of the gunshot wound.

Later that morning, police stopped petitioner for a traffic violation. During an ensuing search of petitioner, police found two handguns and several bullets. Several days later, one of the men from the car identified petitioner as the driver who fired the shots at Quezada. The state charged petitioner with intentional second degree murder, for which petitioner was convicted and sentenced to imprisonment for ten years without eligibility for parole.

III. Discussion

Petitioner initially raised six issues in his writ. Following respondents' Answer and Return, petitioner filed a Traverse to the Answer, wherein petitioner offered supporting arguments and cited legal authority with respect to only two issues. The court now considers each of the six issues raised by petitioner.

A. Failure to Grant New Trial Based Upon Testimony of Sergio Saldana

Petitioner contends that he is entitled to a new trial based upon information that a state's witness, Sergio Saldana, lied at trial as to the charges against Saldana in anticipation of a favorable recommendation from the state in exchange for Saldana's testimony.

At trial, Saldana testified that petitioner confessed while incarcerated at the county jail to shooting Quezada, but that Quezada was not the intended target. Prior to that testimony, Saldana testified regarding his current charges, which included three failures to appear, one habitual driving, and one driving while suspended. On cross-examination, Saldana was asked about his failures to appear and other driving violations.

In his motion for new trial, petitioner alleged that Saldana also had been convicted of aggravated battery and that Saldana deliberately misled the jury concerning the reasons for his incarceration by failing to disclose to the jury that his probation for the aggravated battery conviction had been revoked. Petitioner further alleged that Saldana received a benefit in that his probation on the aggravated battery charge was reinstated by another judge the day after Saldana testified at petitioner's trial, and Saldana was released from jail. Further, the prosecutor at petitioner's trial admitted that he knew prior to trial that Saldana had a conviction for aggravated battery, but stated that he carefully limited his questions to Saldana to avoid disclosure of that fact to the jury.

The record is clear that, after petitioner's trial, the state did not contest Saldana's probation reinstatement and that Saldana in fact received favorable treatment from another judge as a result of his testimony. The court notes that the judge who reinstated Saldana's probation did so, at least in part, out of concern for Saldana's welfare in prison for testifying against petitioner.

A prosecutor who knowingly presents false evidence violates due process, regardless of whether the evidence is relevant to substantive issues or to witness credibility only. *Napue v. Ill.*, 360 U.S. 264, 269 (1959). In order to establish a due process violation, petitioner must show that (1) Saldana's testimony was in fact false; (2) the prosecution knew it to be false; and (3) the testimony was material. *United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002).

In *Napue*, the Supreme Court found a due process violation where an important witness for the state falsely testified that he had received no promise of consideration in return for his testimony though, in fact, the prosecuting attorney had promised consideration. *Id.* at 269-70. The court stated:

Had the jury been apprised of the true facts, however, it might well have concluded that [the witness] had fabricated testimony in order to curry the favor of the very representative of the State who was prosecuting the case in which [the witness] was testifying, for [the witness] might have believed that such a representative was in a position to implement (as he ultimately attempted to do) any promise of consideration.

Id. at 270.

The case at hand differs from *Napue*. In this case, the lower court made a factual finding that there was no agreement between the state and Saldana before Saldana testified at petitioner's trial. This court places great weight on the testimony of the attorney who previously represented Saldana. Saldana's former attorney testified that he set up the meeting between Saldana and the prosecutor after Saldana disclosed that he had information about Quezada's murder. The attorney further testified that the prosecutor made it clear

that the state offered no promises in exchange for Saldana's testimony. In fact, Saldana's former attorney stated that he and the prosecutor both believed it was not possible to obtain favorable treatment because Saldana's probation had previously been revoked.

This distinction is highly significant to the court. Aggravated battery is not, in and of itself, a crime bearing on Saldana's character for truthfulness. Thus, the only way in which Saldana's battery conviction becomes material is if the conviction relates to Saldana's motive for testifying falsely against petitioner. The record is clear that neither Saldana nor the state knew prior to petitioner's trial that Saldana would later receive favorable treatment from another judge. Accordingly, there were no facts of which the jury should have been apprised indicating that Saldana may have fabricated his testimony in order to curry favor with the prosecutor. In other words, there is nothing in the record suggesting that Saldana had a bias or motive for testifying falsely against petitioner. The simple fact that Saldana had been convicted of aggravated assault was not material to his testimony. It bears noting, however, that the court looks with disfavor upon the actions of the prosecutor in this case. The court does not condone the prosecutor's attempt to keep the fact of Saldana's conviction from the jury. Having said that, the court concludes that the prosecutor's actions did not rise to the level violating petitioner's constitutional right to a fair trial.

Even if the court concluded that the jury should have been apprised of Saldana's aggravated battery conviction, that information would not have changed the result of the trial. One of the men in the victim's car, Manual Lozano, testified that he recognized petitioner at the time of the shooting and later identified petitioner at trial as the shooter. As such, Saldana's testimony was not the only evidence against petitioner at trial.

B. Failure to Give Informant Cautionary Instruction

Petitioner next argues that the trial court erred in failing to give a cautionary instruction with respect to the testimony of Saldana. Kansas Pattern Instruction 52.18 instructs the jury to “consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.” PIK Crim.3d 52.18-A. The record reflects that petitioner did not request such an instruction at trial.

In the habeas context, petitioner’s burden in attacking his conviction based on an erroneous omission of a cautionary jury instruction is a heavy one—“even greater than the showing required to establish plain error on direct appeal.” *Maes v. Thomas*, 46 F.3d 979, 984 (10th Cir. 1995) (internal quotation marks and citation omitted). The court may set aside petitioner’s conviction on this ground only if, in the context of the entire trial, the failure to instruct the jury to carefully consider Saldana’s credibility as an informant “had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial.” *Id.*

In this case, the court concludes that Saldana does not fit the category of an “informant” as set forth in PIK 52.18-A. Saldana was not an agent of the state when petitioner admitted to the shooting while both were incarcerated. Rather, after petitioner confessed, Saldana went to his attorney, who then approached the state with the proffered testimony. Moreover, as already discussed herein, Saldana was not promised any benefit from the state in exchange for his testimony. Accordingly, Saldana was not an informant under PIK 52.18-A. The court holds that the omission of PIK 52.18-A did not render petitioner’s trial fundamentally unfair.

C. Admission of Other Weapons Found on Petitioner at Arrest

Petitioner argues that the trial court erred in admitting evidence of bullets and weapons found by police after petitioner was stopped some hours after the murder. In support, petitioner cites the fact that the

state's expert testified that the two weapons found during the search could not have fired the bullet that killed Quezada. Prior to trial, petitioner moved to suppress evidence of the weapons found during the search, which the trial court denied. However, at trial, petitioner raised no objection to the admission of this evidence and, in fact, specifically stated that he had no objections when asked by the court. Petitioner offers no argument in this habeas proceeding regarding this issue.

Where a state prisoner has defaulted, pursuant to an independent and adequate state procedural rule, in his presentation of federal claims to the state courts, federal habeas review is barred unless the prisoner demonstrates cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrates a fundamental miscarriage of justice will result if the claims are not considered. *Sawyer v. Whitley*, 505 U.S. 333, 338 (1992). The question of when and how a state procedural default precludes federal habeas relief is a matter of federal law. *Johnson v. Miss.*, 486 U.S. 578, 587 (1988).

To preclude federal habeas review, a state procedural bar must be both adequate and independent of federal law considerations. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). A state procedural rule is "independent" where the procedural bar was the exclusive basis for the state appellate court's holding. *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir. 1998). The state rule is considered "adequate" only if the rule is a "firmly established and regularly followed state practice" and applied to all similar claims in an evenhanded manner in the majority of cases. *Messer v. Roberts*, 74 F.3d 1009, 1015 (10th Cir. 1996) (citations omitted).

In this case, the Kansas Supreme Court held that, because petitioner did not raise an objection to the weapons evidence at trial, petitioner did not preserve the issue for appeal. Thus, this procedural rule was the exclusive basis for the state supreme court's holding. In so holding, the court cited *State v. Jones*,

267 Kan. 627, 637, 984 P.2d 132 (1999) for the proposition that, when a motion in limine or motion to suppress is denied, the moving party must object to the evidence at trial to preserve the issue on appeal.

The court concludes that the contemporaneous objection rule is firmly established and regularly practiced in Kansas state courts. *See, e.g., State v. Sims*, 262 Kan. 165, 936 P.2d 779 (1997) (to preserve objection to admission of prejudicial gang evidence, defense must make timely and specific objection to admission of evidence at trial, despite unfavorable pre-trial ruling on the question); *State v. Johnson*, 258 Kan. 61, 70, 899 P.2d 1050 (1995) (admission of defendant's confession not reviewable on appeal where defense failed to renew objection during trial); *State v. Alford*, 257 Kan. 830, 840, 896 P.2d 1059 (1995) (admissibility of written statement not an issue on appeal where defense objected during pretrial, but failed to object during trial).

The court thus finds the Kansas Supreme Court's denial of petitioner's appeal on this issue, based upon this independent and adequate state procedural rule, constitutes petitioner's procedural default for the purpose of seeking federal habeas corpus review. This court's review of petitioner's claims is thus barred absent a showing by petitioner of "cause for the default and actual prejudice as a result of the alleged violation of federal law, or . . . that failure to consider the claims will result in a fundamental miscarriage of justice." *Hoxsie v. Kerby*, 108 F.3d 1239, 1243 (10th Cir. 1997). The record contains no such showing in this case. The court thus finds federal habeas corpus review of petitioner's allegations of constitutional error is barred by petitioner's procedural default.

D. Response to Jury Question

Petitioner contends that the trial court erred in its instruction to the jury after the jury relayed a question to the court regarding the meaning of "sudden quarrel" and "heat of passion." During jury

deliberations, the jury passed a note to the trial judge with the following message: “Please more specifically interpret the phrases ‘sudden quarrel/heat of passion.’ We are unsure whether there is a specific time limit required to fit these definitions. I.e. would the shooting have to have occurred in the parking lot to fulfill this definition.” Petitioner offers no argument in this habeas proceeding regarding this issue.

The trial court proposed to answer the question by giving the PIK instruction for the definition of “heat of passion,” which was not included in the original set of jury instructions. Counsel for the state and petitioner agreed with the proposal. Petitioner, however, further proposed that the court also address the question on sudden quarrel. The trial court denied the request, finding that it added nothing informative. The trial court then specifically asked petitioner if he had any objections to the answer, to which petitioner replied that he did not.

The court first addresses whether the trial court should have read the heat of passion instruction to the jury, rather than simply passing the instruction back to the jury. Petitioner did not object at the time to passing the instruction back to the jury. In any event, the court concludes that any error in failing to read the instruction was, at best, harmless. The jury apparently had no problem with the response, as no further questions were presented by the jury to the trial court. Petitioner has failed to establish that he was in any way prejudiced by the trial court’s failure to read the instruction aloud to the jury.

The court turns next to whether the instruction ultimately given was sufficient to satisfy the jury’s request. The court is again reminded that petitioner’s burden in attacking his conviction based on an erroneous jury instruction is a heavy one. *Maes*, 46 F.3d at 984. Petitioner must establish that the error rendered the trial fundamentally unfair as to cause a denial of a fair trial. *Id.*

The heat of passion instruction given to the jury reads as follows: “Heat of passion means any intense or vehement emotional excitement which was spontaneously provoked from circumstances. Such emotional state of mind must be of such degree as would cause an ordinary person to act on impulse without reflection, period.” Petitioner initially suggested that the court also instruct the jury to consider the evidence to determine whether the murder occurred as a result of a sudden quarrel. The court agrees with the trial court—petitioner’s requested instruction did not add anything of substance to the heat of passion instruction. Moreover, the jury submitted no further questions on the matter. The court finds that the instruction given did not render petitioner’s trial fundamentally unfair.

E. Voluntary Manslaughter Instruction

Petitioner asserts that the trial court’s instruction on voluntary manslaughter improperly shifted the burden of proving mitigating circumstances to him. Petitioner did not object to the instruction at trial.

Petitioner offers no argument in this habeas proceeding regarding this issue. At the state court level, petitioner argued that the instruction did not clearly indicate that he did not have the burden to prove a sudden quarrel or heat of passion. Petitioner contended that PIK 52.08, which instructs the jury to consider evidence of affirmative defenses, should have been given to the jury. However, as the Kansas Supreme Court indicated, petitioner equates the mitigating circumstances of heat of passion or sudden quarrel to an affirmative defense. Heat of passion and sudden quarrel are not considered affirmative defenses. Having reviewed the instruction given, the court concludes that the instruction was not erroneous. The trial court properly instructed the jury as to the state’s burden of proof.

F. Failure to Give Eye Witness Cautionary Instruction

Finally, petitioner asserts that the trial court erred in failing to give a cautionary instruction regarding the eyewitness testimony of Lozano. At trial, petitioner did not request a cautionary instruction on eyewitness testimony. Petitioner offers no argument in this habeas proceeding regarding this issue.

In any criminal action in which eyewitness identification is a critical part of the prosecution's case and there is a serious question about the reliability of the identification, a cautionary instruction should be given advising the jury as to the factors to be considered in weighing the credibility of the eyewitness identification testimony. *State v. Richmond*, 258 Kan. 449, 455, 904 P.2d 974 (1995). In determining the reliability of eyewitness identification, the court must consider five factors: (1) the opportunity of the witness to view the defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior descriptions of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *State v. Warren*, 230 Kan. 385, 390, 635 P.2d 1236 (1981).

In this case, Lozano's reliability is not in serious question. According to the trial transcript, Lozano saw petitioner earlier that night at the bar. Lozano had also seen petitioner at least ten times before that night. At the time of the incident, Lozano was approximately five feet away from petitioner. Lozano indicated he was very certain of his identification. Moreover, Lozano identified petitioner's car and identified petitioner in a photographic line-up, both of which he claimed he was very certain.

The court concludes that a cautionary instruction was not warranted. Lozano's reliability was not questionable to the extent that petitioner's trial was rendered unfair by the omission of a cautionary instruction. The court denies petitioner's writ of habeas corpus as to all issues raised.

IT IS THEREFORE ORDERED that Petitioner's Writ of Habeas Corpus (Doc. 1) is denied.

Dated this 16 day of July 2003, at Kansas City, Kansas.

s/ Carlos Murguia

CARLOS MURGUIA

United States District Judge